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OFFICE OF THE SECRETARY

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April 16, 1998

**BY HAND DELIVERY**

Ms. Magalie R. Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Re: In the Matter of  
Amendment of Section 73.202(b) Table of  
Allotments FM Broadcast Stations  
Tylertown, Mississippi  
File No.: MM Docket No. 97-45; RM-8961

Dear Ms. Salas:

Transmitted herewith on behalf of TRL Broadcasting Company are an original and four (4) copies of its "Motion to Strike" as directed to the Chief, Allocations Branch.

Should any additional information be required, please contact this office.

Very truly yours,



Henry E. Crawford  
Counsel for  
TRL Broadcasting Company

cc: The Chief, Allocations Branch

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BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

MM Docket No. 97-45

Amendment of Section 73.202(b)  
Table of Allotments  
FM Broadcast Stations  
Tylertown, Mississippi

RM-8961

To: The Chief, Allocations Branch

**MOTION TO STRIKE**

TRL Broadcasting Company ("TRL Broadcasting"), by counsel, hereby submits its *Motion to Strike the Petition for Reconsideration and Motion for Stay* ("Petition") filed by Guaranty Broadcasting Corporation ("Guaranty") in the above-captioned matter on February 25, 1998. In support thereof TRL Broadcasting states as follows:

**I. INTRODUCTION**

1. The Petition is fatally defective on its face and should not have been accepted by the Commission. The Petition violates Section 1.44(e) of the Commission's rules by including the stay request within the Petition. Additionally, the Petition was filed in violation of Section 1.429(b) of the Commission's Rules which prohibits the use of new materials not previously presented to the Commission. Consequently, the document should not have been accepted for filing and must be stricken.

**II. GUARANTY FAILED TO STATE ITS REQUEST FOR A STAY IN A SEPARATELY FILED DOCUMENT AS REQUIRED BY THE COMMISSION'S RULES**

2. As noted above, the full title of the Petition is: "Petition for Reconsideration and Motion for Stay" (emphasis supplied). That title accurately reflects Guaranty's unmistakable intent to include a motion for a stay in the same document as its reconsideration petition. Indeed, Section V of the Petition argues for a stay and is, in fact, entitled:

**THE EFFECTIVENESS OF THE ALLOTMENT MUST  
BE STAYED PENDING RESOLUTION OF THE  
SERIOUS ISSUES RAISED HEREIN**

Petition, Section V (emphasis supplied). There can be no serious dispute over the meaning of this language. Guaranty included a motion for a stay along with its Petition.

3. Section 1.44(e) specifically forbids parties from including a stay request within the body of another pleading. It reads:

(e) Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission.

47 CFR §1.44(e). Consequently, Guaranty's stay request cannot be considered by the Commission. See, Pentecostal Revival Association, Inc., 2 FCC Rcd 6068 (1987) (application for review found to be defective for including request for stay); Roland and Heavener, Oklahoma, 4 FCC Rcd 1349 (1989) (stay request given no consideration where combined with petition for reconsideration); Policies and Rules Concerning Interstate 900 Telecommunications Services,

8 FCC Rcd 2343 (1993) (request for stay dismissed since it was combined with request for reconsideration).

4. From the above, it must be concluded that the Petition was facially defective as filed and the stay request must be dismissed and stricken from the document.

### **III. GUARANTY'S PETITION IS BASED ON MATERIALS THAT WERE NOT PREVIOUSLY PRESENTED TO THE COMMISSION**

#### **A. Introduction**

5. In a long line of cases, the Commission has routinely dismissed petitions for reconsideration in cases where parties have violated Section 1.429(b)<sup>1</sup> of the Commission's rules by attempting to include materials on reconsideration that were not initially presented to the Commission. *Mt. Morris and Savanna, Illinois; Belle Plaine, et al., Iowa*, 5 FCC Rcd 2683 (1990); *Santa Margarita and Guadalupe, California*, 4 FCC Rcd 7887, 7889 (1989); see also *Whidbey Broadcasting Service, Inc.*, 4 FCC Rcd 8726 (1989); *Direct Broadcast Satellite Service*, 53 RR 2d 1637 at 1641-42 (1983). In the present case, Guaranty's Petition relies entirely on new statements, new facts and new legal argument that were never raised below. Therefore, the Petition is facially defective as filed and must be stricken.

6. Section 1.429(b) of the Commission's rules reads as follows:

(b) A petition for reconsideration which relies on facts which have not previously been presented to the

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<sup>1</sup> Guaranty claims that it is seeking reconsideration under "Sections 1.106 and 1.429 of the Commission's rules." Petition, p. 1. However, Section 1.106 explicitly states that it does not apply to notice and comment rulemakings such as the instant case.

Commission will be granted only under the following circumstances:

(1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;

(2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or

(3) The Commission determines that consideration of the facts relied on is required in the public interest.

47 CFR §1.429(b).

7. As will now be seen, the Petition violates Section 1.429(b) of the Commission's rules to such an extent that it cannot be accepted by the Commission.

**B. Facts and Law Presented For The First Time In The Petition**

8. Guaranty's argument on reconsideration was originally presented as a footnote. See, Guaranty's Comments, p.1, n. 1. With the Petition, that humble footnote has been expanded into a 63 page document.<sup>2</sup> Not surprisingly, nearly all of the factual and legal claims are new. Moreover, some of the new facts asserted by Guaranty actually conflict with the facts originally sworn under oath to be true by Guaranty.

9. **The New Declarations.** In its Comments, Guaranty proffered only the March 25, 1997 declaration ("Kendrick Declaration I") of Guaranty principal

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<sup>2</sup> Guaranty did not seek reconsideration of the other arguments advanced in its Comments that were also rejected by the Commission in its Order.

Randy W. Kendrick ("Kendrick"). Now, for the first time, Guaranty submits the declarations of George A. Foster, Jr. ("Foster") (Exhibit B), A. Bridger Eglin ("Eglin"), (Exhibit C) and Gregory Herpin ("Herpin") (Exhibit E). These new declarations go substantially beyond the footnote offered in Guaranty's Comments. They describe meetings, telephone calls and other purported incidents that were never offered into the record below.

10. The Commission has long held that a party cannot supplement the record after the initial decision makes clear the particular respects in which it is deficient. *Payne of Virginia, Inc.*, 66 FCC 2d 633, 637 (1977). These tactics undermine and abuse the Commission's procedures since neither the Commission nor parties such as TRL Broadcasting are given the opportunity to address these claims in the notice and comment proceeding. Therefore, these claims are entitled to no consideration whatsoever. See generally, *Carolyn S. Hagedorn*, 11 FCC Rcd 1695, 1696 (1996).

11. **Kendrick's Changed Testimony.** Kendrick has offered a new, February 9, 1998, declaration ("Kendrick Declaration II") that adds substantially to his original declaration and, indeed, actually contradicts it in several places. This material has no place being offered for the first time on reconsideration and must be stricken along with the rest of Guaranty's pleading.

12. Both Kendrick declarations were sworn under penalty of perjury. However, they contain material discrepancies that not only demonstrate Guaranty's violation of Section 1.429(b) of the Commission's rules, but also call

into serious question Kendrick's and Guaranty's ability to deal truthfully with the Commission.

13. Kendrick originally testified that the only individuals attending a March 7, 1997 meeting were Foster, Herpin and Kendrick himself. Kendrick Declaration I, p. 1, ¶2. He stated:

On March 7, 1997, Roy Henderson visited GBC's offices in Baton Rouge, Louisiana, and met with **me**; **George A. Foster, Jr.**, the President of GBC; and **Greg Herpin**, General Manager of WBBU, WTGE and WGGZ.

Kendrick Declaration I, p. 1, ¶2. Now, Kendrick has changed this testimony, without explanation, to claim that Eglin was at the March 7, 1997 meeting. See, Kendrick Declaration II, p. 1, ¶2.

14. In his initial testimony, Kendrick swore under oath that:

Mr. Henderson responded with "I'll give you \$2,000,000." Mr. Henderson then said that he would not go forward with the Amelia and Tylertown allotments if he could get KCIL "at a deal." **The meeting concluded with no further substantive discussion.**

Kendrick Declaration I, pp. 1-2, ¶2. Kendrick now repudiates his sworn testimony to claim that there were further discussions. In particular, Kendrick for the first time claims that after the "at a deal" conversation, he and Mr. Henderson discussed a suggestion that they "work together". Kendrick Declaration II, p. 2, ¶5. He also adds an entirely new discussion concerning "swallowing a chicken bone." Kendrick Declaration II, p. 2, ¶6. This level of detail is remarkable given the fact that these assertions contradict Kendrick's recollection as stated on March 25, 1997 in Kendrick Declaration I, just days after the March 7, 1997

meeting. It must be concluded that Guaranty is playing fast and loose with the facts.

15. This change in testimony is new and entirely contrary to what was presented below. Neither TRL Broadcasting nor the Commission was ever given an opportunity to consider this testimony. What is most unfortunate about Kendrick's change in testimony is that it appears to have been concocted in order to achieve consistency with statements made by the other Guaranty principals. Hence, this substantial change in testimony taints Guaranty's entire showing.

16. **The Texas Contract Litigation.** In terms of its "legal" showing, Guaranty, for the first time, raises the 1991 civil lawsuit. Years ago, Mr. Henderson was involved in a Texas breach of contract dispute that Guaranty seeks to add to this matter for the first time on reconsideration. Setting aside the utter irrelevancy of this civil suit, it was not raised earlier in the proceeding and, therefore, must be stricken in accordance with Section 1.429(b) of the Commission's rules.

**C. Commission Precedent Demands That The Petition Be Dismissed According To Section 1.429(b) Of The Commission's Rules**

17. It is well settled that a party who fails to use ordinary diligence in collecting information cannot later use that information as the basis for a petition for reconsideration. Whidbey Broadcasting Service, Inc. (KJTT(AM)), 4 FCC Rcd 8726, 8727 (1989). Here, Guaranty is attempting to proffer for the first time information and argument that has always been well within its exclusive control. The exercise of ordinary diligence requires that a party offer all of the statements



of its principals in its comments, not when seeking reconsideration. Guaranty offers no explanation at all for its conduct with regard to either the new testimony or the changed testimony.

18. In Arizona City, Arizona, 4 FCC Rcd 5711 (1989), the Commission granted a motion to strike where new material should have been presented prior to reconsideration. The Commission has also dismissed a petition for reconsideration on procedural grounds where, as here, the petition relied on facts not previously presented to the Commission. Scottsboro, Alabama; Trenton, Georgia; Signal Mountain, Tennessee, 6 FCC Rcd 6111 (1991). Similarly, in Vacaville and Middletown, California, 6 FCC Rcd 143 (1991), the Commission rejected a petition for reconsideration where an engineering analysis was proffered for the first time on reconsideration.

19. In sum, the Petition, on its face, violates Section 1.429(b) of the Commission's rules. In the past, the Commission has unhesitatingly dismissed such petitions. Here we have reams of substantial new testimony offered by principals who could well have given their testimony earlier in the proceeding. We also have the unfortunate case of an individual who has substantially changed his previously sworn testimony. For all this, Guaranty has failed to offer any explanation whatsoever. It is too late to do so now. Therefore, the Petition must be dismissed.

#### **IV. CONCLUSION**

20. TRL Broadcasting is in the process of marshalling its refutation of the speculative and irrelevant attacks launched by Guaranty in the Petition.

However, TRL Broadcasting's preliminary analysis shows the Petition to be so contrary to the Commission's rules that it should not have been accepted for filing in the first place. It plainly violates the Commission's prohibition against including a request for a stay in the same document as a petition. Even more seriously, the Petition is based almost entirely on facts, statements and arguments raised for the first time on reconsideration. Therefore, the pleading is defective in accordance with Section 1.429(b) of the Commission's rules and must be dismissed.

**WHEREFORE**, in accordance with the above, TRL Broadcasting Company respectfully requests that Guaranty Broadcasting Corporation's Petition for Reconsideration and Motion for Stay be stricken.

April 16, 1998

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Respectfully Submitted,

TRL Broadcasting Company

By:

A handwritten signature in black ink, appearing to read "Henry E. Crawford", is written over a horizontal line.

Henry E. Crawford

Its Attorney

CERTIFICATE OF SERVICE

I, Henry E. Crawford, do hereby certify that copies of the foregoing Motion to Strike have been served by United States mail, postage prepaid this 16th day of April, 1998 upon the following:

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